No. 84-262

In The
Supreme Court of the United States
October Term, 1984

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE PUEBLO DE ACOMA IN SUPPORT OF THE POSITION OF THE RESPONDENT

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INTEREST OF AMICUS CURIAE

The Pueblo de Acoma is a domestic nation which has existed in its present location for over a thousand years. Acoma's land ownership has been recognized by the Spanish, Mexican, and United States sovereigns. Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848); Act of December 22, 1858, 11 Stat. 374. The Acoma lands confirmed and granted to it by patent issued in 1877 are presently encumbered by rights-of-way and deeds from the Pueblo which rely for their validity on approval by the Secretary of Interior pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("§ 17"). These encumbrances include:

1) December, 28, 1880 deed to the Atlantic & Pacific Railroad Company, approved January 22, 1931, by the First Assistant Secretary of Interior "insofar as it grants rights-of-way in stone or rock for the construction and maintenance of the grantee's main line of railroad and insofar as it grants water which the grantee has already developed and used and is now using for railroad purposes at its station designated as McCartys and is hereby disapproved insofar as it attempts to grant the right to take stone or rock for commercial purposes and insofar as it purports to give grantee the right to develop water anywhere within the Pueblo of Acoma grant, and to construct pipelines to transport the same to the grantee's main line right-of-way." Acoma received $1.00 for executing this deed.

2) October 2, 1911 deed to the Atchison, Topeka & Santa Fe Railroad Company (ATSF) conveying a tract of land varying from 50 to 400 feet wide "measured from the north side of the right-of-way of said railroad, the total acreage contained in said strips being 97.59 acres, more or less." Acoma received $8,000 in consideration for the execution of this deed.

3) June 9, 1928 easement or right-of-way conveyance to Mountain States Telephone and Telegraph Company (Mountain Bell), approved by the Assistant Secretary of Interior. Mountain Bell paid $75.00 for this right-of-way.

The 1880 and 1911 deeds indicate that none of the Acoma leaders were literate. Each party "signing" the document on behalf of the Pueblo did so by "his mark." Only one of the six individuals signing the 1928 document for Acoma could write his name.

Both ATSF and Mountain Bell had been using these Acoma lands long before passage of the Pueblo Lands Act of 1924. The Pueblo Lands Board (the Board) determined that Acoma's title to these lands and five other claims had not been extinguished.

The 1880 and 1911 deeds are recited in the findings of the Final Decree in the case of *United States of America as Guardian of the Indians of the Pueblo of Acoma v. Arviso, et al.*, No. 2079 In Equity in the United States District Court for the District of New Mexico, Final Decree filed May 14, 1931. The property described in those deeds, to the extent approved by the Secretary of Interior pursuant to § 17, was "quieted and set at rest as against the United States, the Pueblo of Acoma and the Indians thereof" by the terms of that Decree.

Acoma has no desire to halt the continuity of interstate communication systems and the services they provide. Acoma does wish to control its lands to the fullest extent, and to obtain full value for its use.

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SUMMARY OF ARGUMENT

1. The 1924 Pueblo Lands Act language and legislative history clearly shows that Congress' purpose there-

in was to settle existing claims inside Pueblo boundaries. The complete statutory framework reveals that Congress intended to receive reports and recommendations from the Secretary of Interior (§§ 7, 8, 14, 15) for use in formulating future legislation, if necessary. The only grant of consent for future conveyance of Pueblo lands by the tribe and Secretary (§ 16) was limited to isolated parcels outside the "main body" of the Pueblo. § 17 is not clear language authorizing alienation. Except for claims meeting the § 4 standards, or conveyances meeting § 16 criteria, § 17 affirmed Congress' intent to articulate limits on both buyers and sellers, while reserving to itself ultimate control over Pueblo lands.

2. The administrative construction of the Act is immaterial because the statutory limits clearly do not authorize the actions taken under alleged authority of § 17. Even if, arguendo, the administrative acts were authorized, they are entitled to little or no deference because the delegation was not specific, Congress had no awareness of the agency's construction of the Section, Interior had no role in drafting § 17, and the 1928 Act completely addressed the subject of rights-of-way across Pueblo lands.

3. Estoppel by judgment principles should not allow the equity court actions to bar the present suit. The policy of repose must be balanced against the national interests of fairness to Indians and congressional limits on Executive power. The balance favors affirming the opinions below.

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ARGUMENT

I. SECTION 17 OF THE PUEBLO LANDS ACT AFFIRMED THAT CONGRESS, TOGETHER WITH THE PUEBLO AND THE SECRETARY OF THE INTERIOR, MUST APPROVE CONSENSUAL ALIENATION OF PUEBLO LANDS AFTER JUNE 7, 1924.

One essential question which will be answered by this case construing § 17 of the Pueblo Lands Act (the Act) is the extent of federal approval required for alienation of Pueblo land. The Indian Trade and Intercourse Act of 1834, 4 Stat. 729, 730, Section 12, codified at 25 USC 177 requires the consent of the Indian nation, the Executive Branch, and one branch of Congress (the Senate, in its capacity to advise and consent to treaties). After Congress, in 1871, decided it would no longer make treaties with Indian nations, federal approval pursuant to the Non-Intercourse Act occurred by Acts of Congress, i.e. approval by both the House of Repesentatives and the Senate, with Executive branch approval.

While the power of Congress to impose a restriction on the right of alienation cannot be questioned, nevertheless an Act of Congress removing a restriction on alienation cannot give validity to a conveyance which, when executed, was void. *Smith v. Stevens,* 77 U.S. (10 Wall.) 321, 326-327, 19 L.Ed. 933 (1870). The use of § 17 to validate conveyances from Acoma made decades before passage of the 1924 Pueblo Lands Act clearly violates this rule.

§ 17 has been characterized as a statute supplementing the general restraint on alienation in 25 USC 177, enacted to "prohibit conveyances" with respect to the

Pueblos. Cohen, *Handbook of Federal Indian Law* (second edition, 1982), page 516.

A. Congress Intended the 1924 Pueblo Lands Act to Clear Up Land Title Uncertainty Then Existing Within The Exterior Boundaries of the Lands of the New Mexico Pueblos.

The court must determine "the most sensible view of the statutory framework." *Massachusetts Trustees v. United States,* 377 U.S. 235, 242, 12 L.Ed.2d 268 (1964).

In construing a statute, explicit references to certain subjects, and the absence of any such references to other, arguably similar subjects, "manifest the limited scope of the Act's underlying purpose. . . ." *Federal Power Commission v. Union Electric Co.,* 381 U.S. 90, 101, 14 L.Ed. 2d 239 (1965), cited in *Chemehuevi Tribe of Indians v. Federal Power Commission,* 420 U.S. 395, 405, 43 L.Ed.2d 279, (1975).

The limited scope of an Act will be reflected in both the text of the Act and its legislative history. When there is simply no suggestion in any of the legislative materials that the Bill would authorize Petitioner's position, that construction must be rejected. *Id.* at 408.

The Pueblo Lands Act constituted "an effort to provide for the final adjudication and settlement of a very complicated and difficult series of conflicting titles affecting lands claimed by the Pueblo Indians of New Mexico." S.Rep. 492, 68th Cong., 1st Sess., (1924), (1924 S. Rep.) at 3, quoted in H.R. Rep. 787, 68th Cong., 1st Sess., (1924), (1924 H.R.Rep.) at 2. Neither report discussed rights of way.

Both reports support the construction of the Act adopted by the United States District Court and the Tenth Circuit Court of Appeals below. The "complicated questions" which the Bill sought to solve arose because

> . . . in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the Sandoval case [231 U.S. 28, 58 L. Ed. 107 (1913)] they were not competent to do. As a result of this situation, conflicts as to title and right to possession arose and exist in many instances. 1924 S.Rept. at 5.

Testimony developed before previous Congressional hearings on the Pueblos lands disclosed that there were

> . . . approximately three thousand claimants to lands within the exterior boundaries of the Pueblo grants. The non-Indian claimants with their families comprise about twelve thousand persons. With few exceptions, the non-Indian claims range from a town lot of 25 feet front to a few acres in extent. *Id.* at 5.

Congress intended the complicated administrative and judicial procedures set forth in the 1924 Act to solve the existing land claims. Neither house of Congress intended that unsuccessful claims before the Pueblo Lands Board could be cured by Secretarial approval obtained under the authority of § 17.

In order to accommodate the interests of the non-Indians, and yet maintain its role as guardian of the Pueblos' land rights, Congress established very specific procedures intended both to allow the non-Indians to assert their claims and to protect the Pueblo lands from further encroachment.

A Pueblo Lands Board was established to investigate, determine and report on the land granted to or acquired

by each of the Pueblos, not including land title to which had been extinguished by adverse possession of non-Indians under other provisions of the Act. The Board was to be unanimous in any determination that Indian title had been extinguished (§ 2).

Upon the filing of said reports, the Attorney General of the United States was to file a quiet title suit to the lands therein described (§ 3).

Anyone claiming title to any of the lands involved in said quiet title action(s) might plead actual adverse possession, with or without color of title, and payment of taxes (§ 4).

A successful plea under § 4 would have the effect of a deed of quitclaim as against the United States and the Pueblos (§ 5).

The Board was to include in its reports the area, character, and value of any tracts of Pueblo lands in possession of non-Indian claimants and upheld under § 4. The United States was to be liable for the fair market value of any tracts lost by the lack of seasonable prosecution by the United States. The Board's decision was subject to judicial review (§ 6).

> It thus appears that the two sections [§§ 4 and 6] in substance together provide for a *substantial effort to restore to the Indians the land and water rights which they have lost,* or equivalents therefor, and it is not sought to turn over to the Indians any monies to be expended by themselves. 1924 S.Rep. at 8 (emphasis added).

§ 7 requires the Board "to report to the Secretary of the Interior who shall report to the Congress" the fair

market value of lands, water rights, and improvements lost by non-Indians.

§ 8 further required the Board to report to the Secretary of the Interior "the area and the value of the lands and improvements appurtenant thereto of non-Indian claimants . . . title to which in such non-Indian claimants is valid and indefeasible." The report was to "include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises."

§ 14 required the Secretary of the Interior to report to Congress the facts, including the area and value of the land, which any non-Indian party might successfully obtain based on a Spanish or Mexican grant. The Secretary was to report to Congress his recommendations in the premises for all such claims.

> *This paragraph of the Act indicates clearly the extent to which the effort has been made in drafting the Act to fully protect the Indian titles* and also the extent to which in negotiations between representatives of the Indians and settlers the non-Indians have consented to go in conceding measures deemed necessary or advantageous in the protection of the Indians' interests. This is especially obvious to those who have knowledge of the history of these conflicting titles, the nature and extent of which it is needless to comment upon in this report. 1924 H.R.Rep. at 9 (emphasis added).

§ 15 of the Act specifically addresses the kinds of claims raised by Mountain Bell and the Atchison, Topeka and Santa Fe Railroad in the present case. That section

> provided that when any claimant other than the United States for the Indians, not covered by the report provided for in Section 7, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, but has *held and occupied such parcel in good faith claiming a right and has improved the same,* the value of the improvements upon said parcel of land shall be found by the Court and *reported to Congress by the Secretary of the Interior with his recommendations* in the premises. 1924 H.R.Rep. at 9 (emphasis added).

The claims of Mountain Bell and ATSF that the Board rejected should have gone before Congress, accompanied by Secretarial recommendations. Congress dealt with similar situations involving other claimants to Pueblo lands when it passed the 1926 and 1928 Pueblo alienation legislation.

Isolated parcels of Pueblo lands, removed from other Pueblo lands and located among lands awarded under the Act to non-Indians, might be sold by the Secretary of the Interior, under such regulations as he may make, if he deems it to be for the best interests of the Pueblos and secures the consent of the governing authorities of the Pueblos (§ 16).

The language in § 16 constitutes the Act's only clear consent to sell Pueblo lands, and grants authority to the Secretary to do so. The limitations on such sales are manifest, and contrast sharply with the language in § 17. § 16 allows sales of only lands "apart from the main body of the Indian land" and requires a Secretarial finding that the sale is "for the best interest of the Indians." Tribal consent was also required.

The 1924 committee reports each describe § 17 in identical language:

> Section 17 provides that no right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished shall be hereafter acquired or initiated in any manner except as may hereafter be provided by Congress and that no sale or lease or other conveyance made by any Pueblo as a community or any Pueblo Indian living in a community of Pueblo Indians in the State of New Mexico shall be of any validity unless first approved by the Secretary of the Interior. 1924 S.Rep. at 11, 1924 H. Rep. at 10.

While this legislative history, particularly concerning § 17, is sparse, it nevertheless reveals the speculative nature of several arguments raised by the petitioner in this cause, and *amici curiae* supporting the Mountain Bell position. Congress recognized that the Pueblo land title problems arose "in many cases" because of attempted conveyances from Indians to non-Indians. 1924 S.Rep. at 5. *United States v. Wooten*, 40 F.2d 882, 885 (CA10, 1930) construed § 4 of the Act, discussing its intent. When ascertaining this factor, it found

> where doubt exists the courts may, and should, *look to the situation which confronted Congress.* (Citations omitted) * * * *Congress confronted a situation where people had purchased lands* in reliance upon existing law, paid for them, and improved them, and claimed to own them. These people had strong moral claims which Congress expressly recognized by Section 4 of the Act. But Congress laid down the specifications for such claimants; if their proof measured up, their titles were good; if not, they were not. (emphasis added)

Both Mountain Bell's right-of-way in the present case, and the c'aims of ATSF and Mountain Bell described in Acoma's Statement of Interest failed to meet the statutory

criteria for extinguishing Pueblo title. Petitioner and its *amici* continue to argue for a strained construction of § 17 and for this Court to give these unsuccessful claimants before the Board another opportunity to circumvent its findings that their claims failed to meet the requirements of the Act. Such construction violates the rule that where an Act was meant to protect Indian interests, the court must construe the Act in the Indian's favor, and to reserve Congress' power to authorize alienation in the absence of clear statutory language to the contrary. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-656, 48 L.Ed. 2d 274 (1976).

The reports required by §§ 7, 8, 14, and 15 demonstrate Congress' intent to reserve to itself ultimate control over the resolution of claims to ownership of Pueblo land. Petitioner's argument ignores this clear, though complex framework, and the intent to protect Pueblo interests, choosing to wrest § 17 out of context to buttress its position.

Furthermore, petitioner's argument that § 17 should be construed to permit loss of part or even all of the "main body" of a Pueblo's lands appears hard to accept, in light of § 16's allowing consensual alienation of only lands "apart from the main body of Indian land."

B. The Language of § 17 Clearly Shows Congressional Intent to Bar Future Loss of Pueblo Lands Without Subsequent Specific Congressional Authorization.

The 1924 statutory framework provided the exclusive means and full extent of Congressional approval for validating existing non-Indian claims and land uses within

Pueblo boundaries. § 17 thus limited Pueblo land losses to those "extinguished as hereinbefore determined" by the Board or the Federal Court pursuant to standards established in § 4.[1]

The additional requirement in § 17 for approval by the Secretary of Interior for any conveyance by Peublo need not be a "puzzle." Pet. br. p. 17. While Congress clearly intended the Board and federal courts to settle existing claims against Pueblo lands, and allowed the sale of lands outside the Pueblo's "main body," with consent of the Secretary and the "governing authorities of the pueblo" (§ 16), all other actions involving Pueblo lands, whether equitable adjustment of existing claims (§§ 8, 15), or future needs by non-Indians for Pueblo lands (§ 17) would require additional legislation.

Secretarial review and approval of any "conveyances of land" by Pueblo Indians makes complete sense in light of the situation facing Congress in 1924. Improvident conveyances led to the existence of many of the 3000 claims against Pueblo lands. Even after disposing of those claims, Congress recognized the value of having future conveyances, even for consented to purposes, reviewed to assure that Pueblo people would not be victimized in the process of negotiation. This would insure that the Pueblo lands be treated as other "Indian lands" and that the

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1 "Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that '[a]bsent a clearly expressed legislative intention to the contrary [statutory] language must ordinarily be regarded as conclusive.'" *Escondido Mutual Water Company v. La Jolla Indians*, — U.S. —, 80 L.Ed.2d 753, 761 (1984).

Pueblo Lands Act be understood as a singular transfer of Pueblo titles to non-Indians.

The two parts of § 17 joined by "and" do not represent alternative methods of acquiring interests in Pueblo lands, but the reciprocal parts of any alienation thereof.

The first part concerns the acquisition of an interest in Pueblo lands. Non-Indians cannot acquire an interest in Indian lands without federal authorization. *Worcester v. Georgia*, 31 (6 Pet.) U.S. 515, 544, 8 L.Ed. 483 (1832). The language of this part refers exclusively to the party acquiring an interest in Pueblo land and such acquisition cannot take place "except as hereafter provided by Congress."

The second part concerns the consent by the Pueblos to relinquish their interest and approval thereof by the Secretary. The language of this part refers exclusively to the tribal and federal parties relinquishing their interest in Pueblo land. See *Alonzo v. United States*, 249 F.2d 189, 197 (CA10, 1975), cert. den. 355 U.S. 940 (1958).

II. THE ADMINISTRATIVE CONSTRUCTION OF SECTION 17 BEING UNAUTHORIZED BY THAT SECTION, INCONSISTENT THEREWITH AND NOT THE RESULT OF ANY DELEGATED AUTHORITY, IS NOT ENTITLED TO DEFERENCE.

If Congress' intent be clearly expressed by statute, any opinion or action of the administering agency, indicating a different view, is immaterial. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. —, 81 L.Ed.2d 694, 703 (1984). Administrative construction contrary to Congressional purpose must be rejected by the

judiciary, the final authority on issues of statutory construction. *Federal Elections Committee v. Democrats Senatorial Campaign Committee,* 454 U.S. 27, 32, 70 L.Ed. 2d 23 (1981).

Where the statute is ambiguous or silent with respect to the matter at issue, the court may consider permissible constructions placed on it by the agency, but only when the agency interpretation is consistent with the agency's congressional authorization. *United States v. Vogel Fertilizer Co.,* 455 U.S. 16, 24, 70 L.Ed.2d 792 (1982). The administrator acts only on the basis of statutory authority and cannot expand or alter such authority from that given in the statute. *Guardians Assn. v. Civil Service Commission of the City of New York,* — U.S. —, 77 L.Ed.2d 866, 890 (O'Connor concurring) (1983). He may neither expand his power beyond that given nor assume power not provided for. *United States v. George,* 228 U.S. 14, 20, 57 L.Ed. 712 (1913).

Repeated violation by an agency of its statutory mandate will not validate its ultra vires acts. *F.M.C. v. Seatrain Lines, Inc.,* 411 U.S. 726, 745, 36 L.Ed.2d 620 (1973); *Pittston Stevedoring Corp. v. Delaventura,* 544 F.2d 35, 50 (CA 2 1976); affirmed *sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 53 L.Ed.2d 320 (1977); *Pratt and Whitney Aircraft v. Donovan,* 715 F.2d 57, 62 (CA 2 1983).

The decision as to the limits of an agency's statutory power is a judicial, not an administrative function. *Batterton v. Francis,* 432 U.S. 416, 424-425, 53 L.Ed.2d 448

(1977)[2]. Particularly where, as here, the question is one of interpreting a statutory term, the courts are the specialists and freely substitute their judgment for that of the administrative agencies. *Pittston, supra* at p. 49. On such matters the courts are the final authorities, *Federal Election Committee, supra,* at p. 42, since deciding what a statute means is a quintessential judicial function. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority,* —U.S. —, 78 L.Ed.2d 195, 203, fn. 8 (1983).

The actions of the agency in confirming old deeds and granting rights-of-way under purported authority of §17 were contrary to the purpose of the Pueblo Lands Act and exceeded its authority. Under these circumstances, the administrative construction is not entitled to deference. There is no evidence of any legislative purpose supporting the administrative interpretations of § 17. § 4 set forth the only standards for extinguishment of Indian title under the Act. Unsuccessful claimants could either seek tribal and secretarial approval for conveyances of lands isolated from the "main body" of the Pueblo (§16) or seek secretarial recommendation for congressional consent to estinguishment of Indian title under §15.

The desired finality and preclusiveness could not be achieved if claims which failed under the Act could there-

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[2] Where the question concerns an agency interpretation involving an exercise of authority appearing to expand the limits of the agency's statutory power, the courts need not be deferential. " . . . the determination of the extent of authority given to a delegated agency by Congress is not left for the decision to him in whom authority is vested." *Addison v. Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 616, 88 L.Ed. 1488 (1944).

after be revived under §17. Yet that is what occurred in the present case and what the administrative construction represented. The rights-of-way over the Santa Ana and Acoma Pueblos as well as others in place before 1924 were not sustained by the Board but later were approved upon the advice and signature of the administrators. In fact, under Petitioner's interpretation, every one of the approximately 3000 claimants to Pueblo land could have used this procedure.

Likewise, the legislators had no motive to use §17 as a means of conveying rights-of-way. There is no evidence that Congress or the agency believed in 1924 that rights-of-way over Pueblo lands could not be acquired under the Indian Right-Of-Way Act of 1899 (30 Stat. 990), 25 USC 312 et seq. In 1924 application for rights-of-way through Santa Ana, Jemez, and Zia Pueblos were approved under that Act. A railroad secured rights-of-way over San Felipe Pueblo in 1904 and 1922 under the same Act (Kelly, "Section 17 of the Pueblo Lands Act: A Study of Legislative History and Administrative Practice" pp. 20-21).

The administrative decision to use §17 in securing rights-of-way derived not from any reading of the legislative purpose, but from the dilemma which faced the agency and those seeking rights-of-way when the Board determined that the Pueblo lands, because of the nature of their titles, were not subject to the 1899 Act[3]. This left no means for securing rights-of-way across Pueblo lands and also meant that the numerous rights-of-way in exist-

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[3] The Pueblos held their land in fee simple communal title and it was believed that this made them not subject to acts addressing Indian Reservations.

ence were without legal support. Congress acted promptly. Act of May 10, 1926, 44 Stat. 498 (1926); and Act of April 21, 1928, 45 Stat. 442, 25 USC 322 (1928).

Just as the courts must determine whether the administrative acts are authorized by the statute in the first place, having so concluded, they must then decide the degree of deference merited by the circumstance. *Federal Elections Committee, supra,* at p. 42. "The Court may not . . . abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber v. Allen,* 396 U.S. 168, 193, 24 L.Ed.2d 345 (1969).

Where Congress explicitly authorizes an agency to develop specialized expertise in its field and to use that expertise to give content to the goals and principles of the act, the agency is entitled to considerable deference when it exercises its special function of applying the general provisions of the act to the complexities of its area of expertise. *Bureau of Alcohol, supra,* at 202 (1983). In the formal context of rulemaking, regulations resulting from such explicit congressional delegation receive controlling weight unless they are arbitrary, capricious or contrary to the statute. *United States v. Morton,* 467 U.S. —, 81 L.Ed.2d 680, 691 (1984). However, even in these circumstances of maximum deference, the courts have a duty to prevent ". . . unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 318, 13 L.Ed.2d 855 (1965), quoted in *Bureau of Alcohol, supra,* at 202. They must not ". . . rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown,* 380 U.S.

278, 291-292, 13 L.Ed.2d 839 (1965), quoted in *Bureau of Alcohol, supra* at 202[4].

The degree of deference varies with the comparative qualifications of the agency and the court to decide the particular question (degree of specialized expertise required and possessed by the agency) and the nature, scope and specific exercise of the authority committed to the agency by the statutory authorization.

A regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision is entitled to greater deference than one issued under a more general delegation. *Vogel Fertilizer, supra,* 24. Compare *Federal Election*

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[4] Although the judiciary will accord substantial deference to an agency's interpretation of its authority where Congress has specifically delegated the power to make substantive determinations within a circumscribed subject area, the courts must determine the extent of statutory authorization and ". . . must reject administrative constructions . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Committee, supra* at 42; *Morton v. Ruiz,* 415 U.S. 199, 237, 39 L.Ed.2d 270 (1974). The power to abridge or enlarge a statute is a legislative not administrative function. Administrative intrusion into the realm of Congress is not justified by its reasonableness. *United States v. George, supra,* 21-22 (1913), cited in *Guardian Assn., supra,* 889. Deference to an agency's views is ". . . constrained by an obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College v. Davis,* 442 U.S. 397, 411, 60 L.Ed.2d 980 (1979), quoting from *Teamsters v. Daniel,* 439 U.S. 551, 556, 58 L.Ed.2d 808 (1979). Although an administrative interpretation is not invalid simply because the language of the statute will support a contrary interpretation, it is not to be sustained simply because it is not "technically inconsistent with the statute when it is fundamentally at odds with the manifest congressional design. It must harmonize with the statute's 'origin and purpose'." *Vogel Fertilizer, supra,* 26.

Committee, supra, 37, with *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142, 50 L.Ed.2d 343 (1976).

There being no specific delegation of authority to the agency in the present circumstance, the degree of deference merited, if any, is slight.

Furthermore, there is no evidence that Congress was even aware of or ratified the agency construction in the present case.

Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position and whether it participated in the drafting of the governing statute. In essence these are further measures of the conformity between the administrative interpretation and congressional view since they generally judge the degree to which the legislature relied upon, ratified and/or was aware of the agency's interpretation. Thus, deference is influenced by the consistency of the interpretation with earlier and later agency positions *Mortion v. Ruiz, supra,* and is " . . . applicable in instances where . . . an agency has rendered binding, consistent, official interpretation of its statutes over a long period of time." *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 41, fn. 27, 51 L.Ed.2d 124 (1977); *Udall v. Tallman,* 380 U.S. 1, 16-17, 13 L.Ed.2d 616 (1965). These principles have particular force where the agency was intimately involved in the drafting of the applicable legislation and thereafter was expressly delegated the responsibility of setting its machinery in motion. *Aluminum Co. v. Cent. Lincoln Peoples Util. Dist.,* — U.S. —, 81 L.Ed.2d 301, 310 (1984); *Blum v. Bacon,* 457 U.S. 132, 141, 72 L.Ed.2d 728 (1982); *Zenith Radio Corp. v. United*

States, 437 U.S. 443, 450, 57 L.Ed.2d 337 (1978). If there is insufficient evidence that Congress was aware of the administrative interpretation, then the deference is not merited. *Zuber v. Allen, supra,* 193.

There is no evidence that the agency participated in the drafting of §17. Since the agency still believed in 1925 that the 1899 Act applied to the Pueblos, it had no reason to seek authority to approve rights-of-way. §17, under the Defendants' view would have repealed that Act as to any rights-of-way across Pueblo lands. No one intended that result.

Likewise, there is no evidence that Congress was aware of or in any manner, ratified the agency's administrative construction. In 1926 and 1928 Congress passed rights-of-way acts specifically directed at Pueblo lands. The 1926 Act was an emergency measure, found defective, supplemented and perhaps repealed by the 1928 Act. The 1928 Act applied the 1899 Act to Pueblo lands. In sharp contrast to §17, it includes detailed specifications for the granting of rights-of-way.

The 1928 Act constituted a comprehensive scheme which completely covered the subject of rights-of-way over Pueblo lands. *Plains Electric Gen. and Transmission Coop. v. Pueblo of Laguna,* 542 F.2d 1375, 1379 (CA10 1976). The fact Congress applied such a comprehensive scheme to the subject, just four years after the enactment of §17, making the Agency construction of that section superfluous, without mentioning the Section shows a lack of knowledge of the agency interpretation.

The failure of Congress to object to the agency construction lends no support to the Defendants' position.

"Unless Congressional repudiation of a specific practice has been sought and denied, to rely on an administrative practice, of which there is no indication that Congress was aware, is to elevate Congressional inaction to positive legislative decision." *Wade v. Lewis,* 561 F. Supp. 913, 944 (N.D. Illinois, E.D., 1983). Congressional silence is a weak basis for implying ratification of an agency interpretation. *Ibid.* See also *Baltimore & Ohio Railway v. Jackson,* 353 U.S. 325, 330-331, 1 L.Ed.2d 862 (1957), *Girouard v. United States,* 328 U.S. 61, 69, 90 L.Ed. 1084 (1946).

III. AN EQUITY SUIT FILED AND CONCLUDED UNDER § 3 OF THE 1924 ACT DOES BAR THIS ACTION.

In 1928, the Assistant Secretary of the Interior approved pursuant to § 17, an agreement between the Pueblo of Santa Ana and Mountain Bell for a right-of-way across the Pueblo's land. The United States then requested and received an Order dismissing Mountain Bell from the quiet title action filed under § 3 of the Pueblo Lands Act. The basis of the order was the easement approved pursuant to § 17. *United States v. Brown,* No. 1814 Equity (D.N.M. 1928). In *United States v. Arviso,* No. 2079 Equity (D.N.M. 1931), the United States by a consent decree agreed to quiet title in ATSF for lands described in deeds executed in 1880 and 1911 by the Pueblo de Acoma and approved by the Secretary of Interior in 1931. Secretarial approval was under the authority of § 17. Jurisdiction in both court proceedings was limited to a quiet title action brought by the Attorney General on the basis of a report filed by the Board.

The courts below correctly rejected the arguments of res judicata and collateral estoppel after holding the con-

tract between the Santa Ana and Mountain Bell invalid under § 17 in the absence of congressional action. The balancing of national interests involved here make estoppel by judgment inappropriate where the district court in quiet title actions filed pursuant to § 3 of the 1924 Pueblo Lands Act made "no effort to decide the validity of the agreement." *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co.,* 734 F.2d 1402, 1407 (CA10 1984).

The doctrine of collateral estoppel or issue preclusion generally will not bar subsequent litigation when a party asserts the absence of a "full and fair opportunity" to litigate that issue in a prior suit. *Allen v. McCurry,* 449 U.S. 90, 95, 66 L.Ed.2d 308 (1980). The issue of whether § 17 authorizes alienation of Pueblo lands, notwithstanding the failure of the claimants before the Board, never received consideration by the district courts in the equity actions. The court merely accepted a motion to dismiss in *Brown* and a consent decree in *Arviso,* both based on the assumption that the conveyance had occurred. For reasons set forth in the district and circuit court opinions below and advanced in Point I of this brief the purported conveyances were void ab initio. Thus, application of estoppel principles against the Pueblos would sanction illegal acts by the Secretary of Interior. This Court should carefully weigh "the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts" i.e. the equity actions. *Allen v. McCurry, supra,* at 96.

Redetermination of the title extinguishment issue is proper here because there is "reason to doubt the quality, extensiveness or fairness of the procedures followed in

prior litigation." *Montana v. United States,* 440 U.S. 147, 164 n.11, 59 L.Ed.2d 210 (1979).

The record in the equity suits shows no evidence introduced on the claims of Mountain Bell or ATSF. Instead we find the Board rejected the specific land use claims later "approved" by the Secretary of Interior and mentioned by the district court without examination, consideration or approval. The unfairness to the Pueblo in barring consideration of the issue outweighs the inconvenience to the claimants in the present litigation. They now, as then, rely on paper title obtained from illiterate Indians. Spirited negotiations may cost money, but no one expects the railroad line to be relocated to mountaintops as a result.

For collateral estoppel to bar a non-party, the nonparty must have had a sufficient "laboring oar" in the prior controversy. *Drummond v. U.S.,* 324 U.S. 316, 318, 89 L.Ed. 969 (1945), cited in *Montana v. U.S., supra,* at 155. This should not be easily inferred in Indian cases. While no one would argue that the Pueblos had such a role in the equity suits, Petitioners and their *amici* rely on *Nevada v. U.S.,* — U.S. —, 77 L.Ed.2d 509 (1983), to support the argument that the United States can appear and thereby bind the Pueblos. *Nevada* barred reconsideration of the measure of water rights under the doctrine of res judicata in a water rights adjudication instituted by the United States and lasting over 30 years, which raised the very issues the U.S. and the Indians sought to litigate in the later suit. The opinion discussed the "same cause of action" and "same parties" inquiries of the res judicata doctrine, and held "that the Tribe, whose interests were

represented in *Orr Ditch* by the U.S., can be bound by the *Orr Ditch* decree." *Id.* at 24.

The principle of finality so emphasized in *Nevada* nevertheless remains subject to a balance of interests. Justice Rehnquist's opinion collects recent cases discussing both collateral estoppel and res judicata in diverse contexts, subsuming them into "principles of estoppel by judgment." *Id.* at 17. Res judicata or "claim preclusion" is proper "only after careful inquiry." *Brown v. Felsen,* 442 U.S. 127, 132, 60 L.Ed.2d 767 (1979). *Felsen,* the only recent case cited by Justice Rehnquist which involved a stipulation and consent judgment, allowed the bankruptcy court to hear extrinsic evidence on the fraud and misrepresentation issues associated with the claims underlying the consent judgment.

The public policy supporting *res judicata* relies ultimately on a "contest" of the claim before bar becomes proper, and the claim considered "forever settled." *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 401, 69 L.Ed.2d 103 (1981). This Court should not close the door on cases involving "overriding concerns of public policy and simple justice." *Id.,* 403 (Blackmun concurring).

The overriding policy concern in the present case is whether an Executive officer can alienate Pueblo land without clear and explicit congressional approval. Using estoppel by judgment rhetoric to uphold administrative action contrary to a statutory framework does not outweigh the detrimental precedent of sanctioning collaboration between Interior officials and a handful of unsuccessful claimants before the Pueblo Lands Board by unswerving judicial devotion to the finality purpose. Simple justice to the Pueblos also cries out for an opportunity to litigate their title claim now.

In *Nevada, supra,* "the only conclusion allowed by the record . . . is that the Government was given an opportunity to litigate . . . and that the Government intended to take advantage of that opportunity", 525. The evidence herein shows the U.S. did not intend to "take advantage of that opportunity" to vindicate the Pueblo's title, despite the 1924 Act which made all non-Indian claimants trespassers, unless they met the standards set forth in § 4 of the Act.

Here we have neither the multiple statutory responsibilities, nor the numerous parties affected which the Court found so persuasive in *Nevada.*

Unlike the circumstances of *Nevada, supra,* 523, the strong fiduciary duty of the United States to represent fully the interests of the Pueblos was not mitigated by legislation imposing a duty to represent others. There is no question here of the judiciary's questioning the policy choices of the political arm of the government. There is only the question of whether the U.S. in the *Brown* case diligently and with reasonable prudence represented the interests of the Pueblo, and whether the U.S. fairly and equitably implemented the statutory scheme of the Pueblo Lands Act. If the U.S. failed on either ground the Pueblo should not be precluded from raising the issues of the present case. *Restatement (Second) of Judgments* (1982) § 26(1)(d) and § 42(1)(e).

By its arrangements with Mountain Bell and the ATSF to secure rights-of-way across Pueblo land without statutory authority, the U.S. clearly violated its duty as trustee to act solely in the interests of the beneficiary.

Restatement (Second) of Trusts, § 170. The standards for a waiver of claim by the Pueblos were not met in the *Brown* and *Arviso* cases. *United States v. Pueblo of Taos*, 515 F.2d 1404, 1407 (Ct. Cl. 1975). The U.S. also ignored the statutory scheme of the Act to protect Pueblo lands from further alienation until subsequent congressional authorization (See pp. 6-11).

The Pueblos should not be considered "in privity" with the United States for res judicata purposes. It should not be held consistent with any principle of public policy or simple justice that statutory violations by Interior officials for the benefit of a handful of railroads and utilities can preclude a Pueblo from asserting rights upheld by the Board and collusively abjured before the equity court. Res judicata principles are intended to advance repose, not reward unlawful behavior. The policy of repose is not absolute; careful judicial inquiry and balancing against procedural due process limits and congressional purpose are required. The present case is especially appropriate for articulating a limit on the extent of estoppel by judgment.

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CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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